IN THE

# Supreme Court of the United States

**October Term, 1967**



**No. 63**

NELSON SIBRON, *Appellant*,

*against*

THE STATE OF NEW YORK, *Appellee*.

**On Appeal from the Court of Appeals of the State of New York**

**No. 74**

JOHN FRANCIS PETERS, *Appellant*,

*against*

THE STATE OF NEW YORK, *Appellee*.

**On Appeal from the Court of Appeals of the State of New York**

## BRIEF OF DISTRICT ATTORNEY OF NEW YORK COUNTY, *AMICUS CURIAE*

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## Interest of *Amicus*

New York County, with its conglomeration of residential, commercial, industrial, financial and amusement areas, its transportation centers, and its varied population, has problems in common with urban areas throughout America. Like other metropolitan centers, the County is facing "the challenge of crime in a free society"—the challenge of coping with a worsening crime problem within the framework of due process of law. Believing that the "stop and frisk law" represents a reasonable accommodation between effective law enforcement and individual freedom, the New York County District Attorney's Office combined with other agencies in supporting the statute, and in presenting guidelines for its proper administration by peace officers throughout the State. We join in urging the Court to preserve it.

## Introduction and Summary of Argument

A New York City policeman on motor patrol received a radio alarm that two men had just committed an assault and robbery with a gun, and that two suspects were seen entering a taxicab, which proceeded in an unknown direction. About five minutes later, a few blocks away, the officer observed a cab with two male passengers coming from the direction of the reported crime. The officer stopped the cab, and the driver said that he had picked up his "fares" near the place reported in the alarm. The officer made an external "frisk" of the suspects' clothing, finding nothing. They denied knowledge of the crime, and were released, having been detained for two

minutes.* Another officer, on foot patrol at 10:00 p.m. in a residential neighborhood of West Harlem where many burglaries had been reported, observed a man for three minutes "going from roof to roof." The patrolman stopped the man on a roof, asked what he was doing, and was told that the man was "looking for a guy who took his watch." During the encounter, the patrolman examined the suspect for weapons, and none was revealed. The man was not taken into custody; the incident took ten minutes.**

These two examples illustrate the two major functions of "stop and frisk" in aiding legitimate police patrol. As the first incident shows, the authority to stop and briefly detain a suspect is a reasonable means of investigating a known crime, or a crime which the officer has probable cause to believe has occurred. It fills a gap, opened by a lack of probable cause to arrest a particular person, but essential to close to prevent the escape of a fleeing suspect, whose identity may never be learned again. The second instance illustrates the necessity of the stop in preventing crime—an equally important police duty—where the situation is still too ambiguous for a criminal charge, but nevertheless calls for immediate interruption of the suspect's activities, and superficial inquiry into his identity and purposes. The authority which New York's statute grants the police officer to protect himself by conducting a limited

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* Report of Stopping by Force or Stopping Accompanied by Frisk, Form U.F. 250, February 22, 1967, Serial Nos. 8, 9, 34th Precinct, N.Y.C. Police Department.

** Report of Stopping by Force or Stopping Accompanied by Frisk, Form U.F. 250, October 1, 1964, Serial No. 3, 30th Precinct, N.Y.C. Police Department.

external examination of the stopped suspect's clothing for concealed weapons flows naturally from the reasonableness of the temporary detention itself. For it is undeniable that police responses to suspicious circumstances necessarily entail real and substantial dangers to the officers' personal safety. Persons confronted by the police in compromising situations all too often respond with violence to prevent apprehension. A tragic illustration of the risks of police patrol is provided by a landmark case previously before this Court. Shortly after midnight, a window on the second floor of a Brooklyn hotel was smashed, and two women shouted "stick-up" from the window. As a passing patrolman sought to enter the hotel, Nathan Jackson pushed his way out of the door. He later confessed that when he met the patrolman on the street he told the officer, " 'There was a fight upstairs.' * * * He insisted I go with him so I got the best of him"; then Jackson shot and killed the officer.* The common assaults on police, the enormous number of deadly weapons circulating illegally in the community, and the widespread use of concealed weapons by persons who commit serious crimes, demand, in the interests of plain humanity, a limited authority to frisk persons whose conduct has aroused reasonable suspicion of criminal conduct.

However, appellants herein urge that the type of police conduct illustrated in the two cases set forth above is "unreasonable," as that term is used in the Fourth Amendment. Thus, in their view, practices considered proper and necessary by professional experts, students of law en-

* See *Jackson* v. *Denno*, 378 U. S. 369 (1964). Jackson's conviction at a second trial was recently affirmed. *People* v. *Jackson*, —— N.Y.2d —— (Oct. 31, 1967).

forcement, and all state and federal courts where the question has been contested, should be abandoned. The main argument presented for this drastic result is that the Fourth Amendment forbids any police interference whatever with personal freedom except upon probable cause to believe that the suspect has committed a crime or is in possession of contraband or evidence of a crime—the standard for taking a suspect into custody or obtaining a search warrant.

This Court has traditionally approached similar questions of "reasonableness" under the Fourth Amendment by considering the reason and necessity for the law enforcement measure, weighed against the degree to which individual privacy is affronted. The sound purposes of the stop and frisk authority are readily demonstrable. And the limited scope of the restraint of the citizen is clearly evident in the New York law as written, and as construed by the highest court of the State: the circumstances must reasonably arouse suspicion; detention must be brief; the officer's effort at self-protection must be limited to an external touching of clothing, unless there are special circumstances warranting an immediate deeper examination, or the touching of the suspect discloses a potential concealed weapon. Further, the language of the statute, and its construction by the New York Court of Appeals, authorize only defensive action, not an exploratory search for evidence.

The theory of stop and frisk, thus reflected in the law of New York, is a joist in the fundamental framework of common law justice, embodied in the Constitution. In this integrated structure, the degree of restraint and interfer-

ence with privacy—from on-the-street encounter with a patrolman, through removal to the station house for booking and the bringing of a criminal charge, to conviction and imprisonment—is proportional to the degree of certainty of guilt. The stop, the pre-natal stage in the development of a prosecution, is deliberately permitted on less than probable cause for belief in guilt. So the progression of certainty must continue beyond probable cause in successive stages as the degree of curtailment of freedom rises: prima facie case for putting a man on trial, proof beyond doubt for convicting him. Minimal evidence of guilt is consistent with the minimal intrusion of the stop and frisk. But, low though the probability of guilt may be, the cause is not absent altogether. In the New York scheme, contrary to arguments made to this Court, an officer is not authorized to stop on whim the poorly dressed man on Park Avenue, the Negro walking on a "white" block, or the youth loitering in front of a corner drugstore. As written and interpreted, the statute requires a reasonable suspicion —one grounded on facts, known or communicated to the officer, which are "sufficient to warrant a reasonably cautious officer to suspect the person of committing or being about to commit certain crimes." Moreover, the law applies only to specified offenses, not to minor infractions sometimes associated with police harassment, such as loitering, disorderly conduct or vice offenses.

The stop and frisk authority expressed in a statute and detailed in police department guidelines, and supervised not only by the courts, but by pervasive public opinion favoring restraint, can be administered without widespread abuse. The application of the stop and frisk law by the

police in the largest city in the State confirms that the police can be circumspect in the use of their authority. Extensive training material distributed to the police emphasizes self-conscious restraint in applying the law. Police reports of illustrative cases show that the appellants' claims of consistent high-handedness are unjustified. Indeed, far from showing that the police will invariably frisk a suspect, as has been charged, the evidence shows that the police have been injured or killed because they neglected to examine suspects for weapons.

The most frequent accusation of abuse, systematic discrimination against members of minority groups, bespeaks a singularly insular view. Negroes and Puerto Ricans on the streets of New York City are stopped and frisked more often than "whites." But this fact reflects no pernicious discrimination or purposeful harassment. The simple fact is that the ratio of Black and White street criminals does not parallel demographic distribution. It would be as telling to attack the law of arrest because the members of a given ethnic group are arrested out of proportion to their fraction of the population. Street crime is the product of social and economic factors which still rest like a plague over many Negro and Puerto Rican families in our City. Many of them are uprooted from other cultures, living without stabilizing family structures, and oppressed by poverty. All citizens share the sense of shame in this persistent blight upon a modern city. But it cannot be ignored as the breeding ground of crime and violence. Only blind disregard for the plainest needs could turn a police agency's attention from the ghetto streets. While the police can do little to alleviate the causes of crime, they

must concentrate law enforcement efforts where street crime is most prevalent. Responsibility to the law-abiding citizens who live in these areas demands no less than active vigil. These undeniable, if unpleasant, obligations inevitably result in the disproportion of Negroes and Puerto Ricans brought in contact with police patrolmen. To term the result "racial discrimination" perverts the term beyond meaningful content. And it may well be that the risk of discrimination and other misuse of the stop and frisk techniques has been reduced by the enactment of a statute, and its stimulation of public scrutiny and carefully drawn police guidelines.

Since the statute is not inherently defective, and misuse can be limited to isolated instances, the statute may be held constitutional, regardless of the facts of particular cases arising before this Court. Section 180-a of the New York Code of Criminal Procedure, and its administration in the three years since its enactment, represent a conscientious effort by the legislature and law enforcement agencies to apply reasonable police techniques carefully. Such instances should be encouraged, not struck down *in toto*, without clear evidence of a danger to individual freedom—evidence lacking in New York.

## ARGUMENT

**The New York stop and frisk statute is a reasonable, limited response to the threat of serious crimes, and to the dangers to police from concealed weapons.**

"It must always be remembered," this Court has said, "that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures" [*Elkins* v. *United States,* 364 U. S. 222 (1960)]. Although there is no "fixed formula" for the determination of reasonableness [*Ker* v. *California,* 374 U. S. 23, 31-32 (1963)], appellants Sibron and Peters, and *amici* on their behalf, suggest one. They urge that in the absence of sufficient grounds for an "arrest"—probable cause to "believe" that the person has committed a crime—a policeman may never stop a citizen abroad in a public place, detain him briefly, and question him as to his identity and his reason for being where he is, even if his conduct has aroused reasonable suspicion that he has committed or is about to commit a crime. Similarly, it is argued, without probable cause to obtain a search warrant or make an "arrest," the officer may not, for self-protection, touch the suspect—"search him"—notwithstanding reasonable ground to suspect that the officer is in danger. In so urging, appellants seek to engraft upon the Fourth Amendment fixed standards of reasonableness, not found in its text, and inconsistent with its spirit and classical interpretations of its commandments.

It "can fairly be stated that in applying the Fourth Amendment, this Court has seldom shown its unawareness of the practical demands of effective criminal investigation and law enforcement" [*Ker* v. *California, supra* at 32].

Thus, the confidentiality of informers has been affirmed [*McCray* v. *Illinois*, —— U. S. ——, 18 L.Ed.2d 62 (1967)]. Replacing formulas with a test of reasonableness, the Court recently has disapproved previous rulings prohibiting searches for "mere evidence" [*Warden* v. *Hayden*, —— U. S. ——, 18 L.Ed.2d 82 (1967)]. In *Ker* v. *California*, an unannounced entry by the police was held reasonable, to prevent escape and the destruction of evidence. Inherent in the Fourth Amendment concept of reasonableness, these decisions suggest, are the dual considerations of the severity of the official interference, and the interests it seeks to enforce. Applied to on-the-street encounters between policeman and civilian, this approach imports a weighing of "the seriousness of the suspected crime and the degree of reasonable suspicion possessed by the police against the magnitude of the invasion of the personal security and property rights of the individual involved."* While this reasoning is here denounced as a "scholastic pretext * * * for oppression" (brief for N.A.A.C.P. Legal Defense Fund, *amicus curiae*, p. 34), similar principles were recently approved by this Court in *Camara* v. *Municipal Court* [387 U. S. 523 (1967)]. There "can be no ready test for determining reasonableness," said the Court in *Camara*, "other than by balancing the need to search against the invasion which the search entails" [*id.* at 536-537].

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* Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 63; see also Tiffany, *Field Interrogation: Administrative, Judicial and Legislative Approaches*, 43 DENVER L. JOUR. 389, 409-410 (1966); Collings, *Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief*, 50 CAL. L. REV. 421, 430-437 (1962); *People* v. *Peters*, 18 N.Y.2d 238, 219 N.E. 2d 595 (1967), *appeal pending; People* v. *Mickelson*, 59 Cal. 2d 448, 380 P.2d 658 (1963); *State* v. *Dilley*, 49 N.J. 460, 231 A.2d 353 (1967); *United States* v. *Thomas*, 250 F.Supp. 771 (S.D.N.Y. 1966).

The long history of judicial and public acceptance of the theory of "stop and frisk" has been demonstrated in the briefs of appellees, and of other *amicus curiae* briefs presently before the Court. With unanimity, federal and state courts where the issue was drawn in question have approved, with or without statutory authority, the stopping and questioning of a suspect without probable cause for belief in his guilt, and, as an adjunct, the reasonable examination of his person for self-protection of the officer. It is significant that California and many other states which led this Court in applying the exclusionary rule to trials in state courts [see *Elkins* v. *United States, supra* at 224-232] have accepted such police procedures,* and that

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* Stop and frisk: *People* v. *Mickelson,* 59 Cal.2d 448, 380 P.2d 658 (1963); *Moore* v. *State,* 187 A.2d 807 (Del. Super. 1963); Del. Code, ch. 11, §§1902, 1903; R. I. Gen. L. §§12-7-1, 12-7-2.

Stop: *Goss* v. *State,* 390 P.2d 220, 223-224 (Alaska 1964), *cert. denied* 379 U.S. 859 (1964); *People* v. *Henneman,* 367 Ill. 151, 10 N.E.2d 649, 650-651 (1937); *State* v. *Chronister,* 353 P.2d 493, 497-498 (Okla. Crim. 1960); *State* v. *Zupan,* 283 P. 671, 675 (Wash. 1929); *Hatfield* v. *State,* 112 W.Va. 424, 164 S.E. 518, 519 (1932); *Huebner* v. *State,* 33 Wis.2d 505, 147 N.W.2d 646, 651-652 (1967); Hawaii Rev. L. §§255-4, 255-5.

Of course, similar rulings and statutes have appeared in states that had no exclusionary rule before *Mapp.* v. *Ohio,* 387 U. S. 643 (1961). In addition to the New York and Ohio authorities presently before this Court, see:

Stop and frisk: *Commonwealth* v. *Lehan,* 196 N.E.2d 840 (Mass. 1964); *Commonwealth* .v *Lawton,* 202 N.E.2d 824 (Mass. 1964); Mass. Gen. L. Ann. ch. 41, §98 (1958); *State* v. *Carpenter,* 150 N.W.2d 129 (Neb. 1967); Neb. R.S. §29-829 (Supp. 1965); N.H. R.S. Ann. §§594:2, 594:3 (1955); *State* v. *Dilley,* 49 N.J. 460, 231 A.2d 353 (1967); *Commonwealth* v. *Hicks,* 209 Pa. Super. 1, 223 A.2d 873 (1966); compare *Commonwealth* v. *Doe,* 167 A. 241 (Pa. Super. 1933).

Stop: *State* v. *Freeland,* 125 N.W.2d 825 (Iowa 1964); *Cornish* v. *State,* 137 A.2d 170, 172-173 (Md. 1957) [Maryland had partial exclusionary rule before *Mapp*]; *State ex rel. Branchaud* v. *Hedman,* 130 N.W.2d 628, 630-631 (Minn. 1964); *City of Portland* v. *Goodwin,* 187 Ore. 409, 427, 210 P.2d 577, 585 (1949).

federal courts, which have operated under the exclusionary rule since 1914, have also approved them.* Section 180-a of the New York Code of Criminal Procedure is a valid expression of these principles. This is demonstrated by the statutory language on its face, its construction by the highest court of the State, and its application by the police. In turning to these matters, we accept the theoretical framework provided to this Court in the briefs of appellees, and of the other *amici* supporting them.

**(a) The statute on its face, and as interpreted by the New York Court of Appeals, permits only a limited interference with privacy.**

**1. The "stop"**

Ancient practice of the common law constable and current practice of the modern police officer on patrol [*cf. People* v. *Rivera*, 14 N.Y.2d 441 (1964), *cert. denied* 379 U. S. 978 (1965)] have been codified and clarified in Section 180-a of the New York Code of Criminal Procedure. In the first provision of the statute, dealing with the "stop," formal legislative sanction is expressed for "Temporary questioning of persons in public places." The New

* Stop and frisk: *Bell* v. *United States*, 254 F.2d 82 (D.C. Cir. 1958), *cert. denied* 358 U.S. 885 (1958); *McLester* v. *United States*, 306 F.2d 880 (10th Cir. 1962), *cert. denied* 379 U.S. 1001 (1965); *United States* v. *Thomas*, 250 F.Supp. 771 (S.D.N.Y. 1966); *United States ex rel. Alexander* v. *Fay*, 237 F.Supp. 142, 148 (S.D.N.Y. 1965); *United States ex rel. Spero* v. *McKendrick*, 266 F.Supp. 718, 724 (S.D.N.Y. 1967).

Stop: *United States* v. *Lewis*, 362 F.2d 759 (2d Cir. 1966); *United States* v. *Middleton*, 344 F.2d 78 (2d Cir. 1965); *McCarthy* v. *United States*, 264 F.2d 473, 475 (8th Cir. 1959); *Jordan* v. *United States*, 254 F.2d 710, 713 (8th Cir. 1958); *Gilbert* v. *United States*, 366 F.2d 923 (9th Cir. 1966); *Busby* v. *United States*, 296 F.2d 328 (9th Cir. 1961), *cert. denied* 369 U.S. 876 (1961); compare *United States* v. *Mitchell*, 179 F. Supp. 636 (D. C. 1959).

York Court of Appeals has construed this provision to permit only "limited detention for purposes of inquiry," "for a short and reasonable period" [*People* v. *Peters*, 18 N.Y.2d 238, 243, 244 (1966)]. This police power is restricted by the legislature to inquiries as to a specified class of serious crimes, namely, felonies, and certain misdemeanors that are considered the most dangerous to public security, including unlawful entry, possession of burglar's instruments, criminally receiving stolen property (as a misdemeanor), some sex crimes, narcotics misdemeanors, and possession of a dangerous weapon (as a misdemeanor). In excluding petty crimes, vice offenses (such as prostitution and small-scale gambling), and disorderly conduct, the statute reduces the opportunities for police harassment, and proclaims that interferences with privacy, however slight, should not be undertaken where the public interest is minor.

Further, the "stop" for inquiry may not be made on bare suspicion or guess, but only upon a reasonable suspicion that the person is committing, has committed or is about to commit a crime. The phrase "reasonably suspects" is deliberately designed to convey a lower basis for attributing guilt than probable cause to "believe." The "ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime" [*id.* at 242]. It is "somewhat below probable cause on the scale of absolute knowledge of criminal activity" [*id.* at 245]. Contrary to suggestions made to this Court, the law, as construed, plainly does not authorize stopping the nocturnal stroller, the passer-by with a criminal record, the shabbily dressed man on Fifth Ave-

nue, the bohemian, the Negro in a "white" neighborhood, entirely on the whim of the officer.

> "Where a person's activities, together with facts and circumstances of which a police officer has reasonably trustworthy information, are sufficient to warrant a reasonably cautious officer to suspect the person of committing or being about to commit certain crimes, that person may be detained and asked for his name, address and an explanation of his activities" [*id.* at 247].

This definition, it may be noted, parallels classic definitions of probable cause to believe, but is calculated to cover more situations.

An illustration of reasonable suspicion was provided by the court in *Peters* in its reference to the facts of that case: the experienced officer, having heard a noise at his front door, "twice observed two men, whom, as a 12-year resident, he did not recognize as belonging in the building, tiptoeing around the top floor of an apartment house. When his door slammed, they hastily exited by the stairway, not the elevator," and he heard them running down the stairs [*id.* at 241, 242]. In the *Rivera* case, *supra,* wherein the concept of reasonable suspicion was applied before the statute became effective, the officers observed two men late at night in front of a bar in an area known for burglaries and robberies, walking up and down and stopping occasionally to look in the window. One suspect then looked in the direction of the officers and said something to his companion, and they walked rapidly away from the officers. The Court of Appeals cited the *Peters* and *Rivera* decisions in *People* v. *Teams* [18 N.Y.2d 835 (1966), *affirming* 20 A.D.2d 803 (2d Dept. 1964), 25 A.D.2d 496 (2d Dept.

1966)], as authority for upholding the detention of a suspect on the basis of two anonymous telephone calls informing the police that "Big Jim" was firing a gun in the street, coupled with the officer's knowledge of the suspect's reputation as the "enforcer" of the neighborhood. Similarly, in *People* v. *Taggart* [20 N.Y.2d 335 (1967)], the court's most recent discussion of "reasonably suspects," the officer received a telephone call from an anonymous caller who reported that a young man of a certain description, wearing "white chino-type pants," had a loaded .32 caliber revolver in his left jacket pocket, and was on a specified street corner. Proceeding to that location, the officer observed a young man who fit perfectly the description provided. And, in *People* v. *Sibron* [18 N.Y.2d 603 (1966)], the suspect was observed over a period of eight hours talking with and in the company of known narcotic addicts.

Although the New York Court of Appeals has only recently had occasion to discuss reasonable suspicion, the standard is not novel. It was used at common law to define the constable's power to detain persons abroad. In *Beckwith* v. *Philby* [6 B.&C. 635, 638-639, 30 R.R. 484, 487 (K.B. 1827)], a suit for assault and false imprisonment, the plaintiff was observed in the evening in possession of a saddle and bridle. The defendant constable had been aware of many thefts of horses within the preceding month, although not for some days. He questioned the plaintiff, whose answers induced the constable to think he had stolen a horse, whereupon the constable searched and detained him. This action was approved, on the theory that "a constable having *reasonable ground to suspect* that a felony has been

committed, is authorized to detain the party suspected until inquiry can be made by the authorities. Now in this case—the conduct of the plaintiff had given the defendants *just cause for suspecting* that he either had committed, or was about to commit a felony" (emphasis added). The concept of reasonable cause to suspect has been used in federal customs statutes since the time of the enactment of the Fourth Amendment, importing less than probable cause to believe, but more than a groundless suspicion [1 Stat. 43 (1789); 14 Stat. 178 (1866); 19 U.S.C. §482; Note, 46 HARV. L. REV. 1307 (1933); Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L., C.&P.S. 393 (1963); see also 8 U.S.C. §1357(c) (1952) (immigration statute)]. It is employed in six state statutes similar to Section 180-a. The numerous state and federal courts that have dealt with the theory of temporary detention of a suspect in a public place for inquiry have found the concept of reasonable suspicion workable, and no more difficult to apply in specific cases than the standard of probable cause to believe. The concept also appears in several English statutes now in force,* where it means less than probable cause for belief in guilt.**

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* The Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), §66, empowers a member of the London metropolitan police force to "stop, search and detain any vessel, boat, cart or carriage in or upon which there shall be *reason to suspect* that anything stolen or unlawfully obtained may be found, and also any person who may be *reasonably suspected* of having or conveying in any manner anything stolen or unlawfully obtained * * *" (emphasis added). See also The Firearms Act, 1965, c. 44, §5.

** *Rice* v. *Connolly*, 2 Q.B. 414, 2 All E.R. 649 (1966); *Hamshere* v. *Bower*, 1965 Crim. L.R. 251 (Q.B.D.); *Seargent* v. *West*, 1964 Crim. L.R. 412; *Wiley* v. *Peace*, 1 K.B. 94 (1951).

**2. The "frisk"**

In its second provision, the New York statute formalizes the legitimacy of the well-established practice of examining for weapons some suspects whom an officer has stopped for questioning, if the officer reasonably suspects that he is in physical danger. Here again, the police conduct must be justified by reasons supporting the suspicion of danger [*People* v. *Peters, supra* at 243-244]. Although the statute speaks generally of a "search," the Court of Appeals has interpreted it to permit only a "limited frisk," defined by the Court as "the patting of the exterior of one's clothing in order to detect by touch the presence of a concealed weapon" [*People* v. *Peters, supra* at 245]. In construing the statute in this manner in *Peters,* the court relied heavily upon a similar principle announced in *People* v. *Rivera* [*supra* at 446]. The Court of Appeals has subsequently explained at length that initial internal examination of the suspect's clothing without grounds for taking him into custody may occur only under special circumstances [*People* v. *Taggart, supra; cf. People* v. *Sibron, supra*]. In New York, even lawful arrest does not permit a search of the inside of the defendant's pockets in every instance [*People* v. *Marsh,* 20 N.Y.2d 98 (1967) (arrest on warrant for traffic violation)].

As evidence of the meaning of the second provision of Section 180-a, appellants cite *People* v. *Pugach* [15 N.Y.2d 65 (1964), *cert. denied* 380 U. S. 936 (1965)], wherein opening the suspect's brief case was upheld, but that case did not arise under the statute, and the statute, by its terms, allows only examination of the "person." The court's recent citation to *Pugach* in the *Taggart* case, *supra* [20

N.Y.2d at 342], is no proof that the same result would obtain today on similar facts. Moreover, the prosecutor had established on the appeal that Pugach actually was under lawful arrest at the time of the seizure, the officers having deliberately arrested him upon probable cause to believe he had committed another crime [Schwartz, *Stop and Frisk: A Case Study in Judicial Control of the Police,* 58 J. CRIM. L., C. & P.S. 532 (1967), reprinted in N.Y.L. Journal, Nov. 28, 1967, p. 1]. Thus, the *Pugach* case has been considered "sui generis" [*ibid.,* N.Y.L. Journal at p. 4, col. 3]. In any event, none of the cases before this Court raises such a question.

Appellants also claim that *People* v. *Hoffman* [24 A.D.2d 497 (2d Dept. 1965)], wherein the officers conducted a very extensive frisk, is evidence that the stop and frisk authority is uncontrolled by the courts. However, that case involved a frisk incident to arrest based upon probable cause.

### 3. Stop and frisk in the context of the system of criminal justice

The brief pre-custodial street occurrence between policeman and suspect, covered by the New York law, is merely the first phase of an integrated scheme in the common law system of criminal justice, whereby "the probability of guilt required to subject a person to official action is directly correlated to the degree of interference with individual freedom contemplated by the action" [LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices,* 1962 WASH. U. L. REV. 331, 359 (1962)]. To approach a person on the public street, a policeman needs no grounds for suspicion or belief concerning his guilt. If the citizen is stopped and detained, reason-

able suspicion is required. Taking the suspect into custody demands probable cause to believe that he has committed a crime, and a prima facie case is required to hold him for trial. Finally, conviction and imprisonment must be founded upon proof of guilt beyond a reasonable doubt.

A similar scale of degrees of probability is applicable to police conduct ascribable loosely as a "search." In the New York scheme, a "limited frisk"—a "patting of the exterior of one's clothing"—is usually the only form of examination permitted under the statute, unless the touching discloses a potential weapon. This minor contact requires reasonable grounds to suspect that the officer is in danger. Probable cause to believe that a crime has been committed, or that contraband will be found, permits a full examination of the suspect's clothing, incident to taking him into custody, or pursuant to a search warrant. Finally, proof of guilt beyond a reasonable doubt permits complete removal of the privacy of one's person, associated with incarceration after a criminal conviction. In short, the underlying theory of stop and frisk—relating the degree of certainty of guilt to the degree to which privacy is affected—is not violative of due process, but, instead, is inherent in the entire process of justice embodied in the Constitution.

**4. The application of the statute to particular facts distinguished from the construction of the statute**

Appellants and others on their behalf incorrectly assert that the Court of Appeals has "construed" the statute to permit broad, unjustified incursions into privacy, and that therefore the statute, "as construed," is unconstitutional. These arguments, however, fail to distinguish between the

State court's discussion of the law in its opinions, and its application of that construction to the facts of particular cases, without opinion. The former is the statute "as construed," not the latter. Assuming that "the statute cannot constitutionally be applied * * * in the circumstances of" a given "case," its unconsidered application to such facts by the State court does not require voiding the statute itself [*Brown* v. *Louisiana,* 383 U. S. 133, 142 (1966)]. The express interpretation of the New York statute in the opinions of the Court of Appeals is reasonable and limited; therefore, it does not follow, as appellants assume, that if specific judgments are reversed and the evidence in those cases held inadmissible, the entire statute must be struck down in the same stroke, and held inapplicable under any circumstances, however reasonable. Appellants' claim, properly analyzed, is that the application by the Court of Appeals of its discussion of the statute to specific fact situations without discussion has been faulty.

For example, the court's opinions show that exploratory searches for incriminating evidence are not authorized by the law, but only self-protective examinations of the suspects, and that a "frisk" is normally the only permissible physical contact with the suspect. Moreover, the State court has announced its awareness of the risks of reliance upon the unsupported testimony of police officers as to the basis for a search for weapons [*People* v. *Taggart, supra* at 343; compare *People* v. *Malinsky,* 15 N.Y.2d 86 (1965), with *McCray* v. *Illinois,* —— U. S. ——, 18 L.Ed.2d 62 (1967)]. However, in *Sibron,* the Court of Appeals has, in the view of both parties before this Court, mistakenly overlooked an exploratory search in affirming the judgment without opinion. The Court of Appeals apparently concluded that

Sibron's move toward his pocket, in response to the officer's remark, could have been suspected by the officer to be a movement for a weapon, justifying the officer's immediate defensive lunge for the concealed item without a preliminary external patting of Sibron's pocket. Although the State court's view of the facts is arguable, its general interpretation of the statute remains: normally, a frisk is the only measure authorized, in the absence of a special circumstance rendering an immediate search reasonable. Analogously, in *Peters,* the most challenging aspect of the judgment, on the facts in the record, is that the officer pointed his gun at the suspect in apprehending him, although the Court of Appeals did not treat this fact in its opinion, and, granting the reasonableness of the stop and frisk theory, the behavior of the officer, as described in the opinion, was clearly not an unreasonable use of force under the circumstances. In the absence of an authoritative legislative or judicial explication to the contrary, the statute is best read to continue the common law authorization of use of reasonable force. The confines of reasonable force are debatable in various situations, but the general concept is unimpeachable.

This Court has rejected challenges to the constitutionality of state obscenity statutes, while at the same time reversing a particular conviction on the ground that the lower courts misapplied prevailing definitions of obscenity to the facts of the case, thereby violating freedom of speech. Such misapplication of state law was distinct from the state court's interpretation of the statute, and did not render the statute inherently defective. Comparably, in *Shuttlesworth* v. *City of Birmingham* [382 U. S.

87 (1965)], this Court accepted the state appellate court's express construction of a loitering statute, but reversed the defendant's conviction because the statute as construed could not constitutionally be applied to the facts in the record.

Furthermore, if the theory of stop and frisk is constitutional, presumably in jurisdictions without a statute its application by the courts to particular facts would be distinct from the validity of the theory itself. Analogously, if a jurisdiction had no statute governing warrantless arrests, courts there would be free to apply the probable case standard to such arrests on a case-by-case basis, and failure to apply the standard properly in a given case would not vitiate the underlying theory. It would be absurd if civilians and policemen in a state which has embodied the theory of stop and frisk in a statute would be entitled to less protection than their neighbors in states with no statute, solely because the local court's application of the theory was not always perfect. And it must be remembered that the cases presently before the Court are not a representative sample of instances in which the stop and frisk theory has been applied.

**(b) Brief detention for inquiry is a reasonable part of police patrol against serious crimes, and a limited frisk is a reasonable response to the dangers to inquiring officers from concealed weapons.**

It is becoming increasingly apparent that crime must be regarded as one of the most serious social problems in America. The high crime rates reported by the FBI, set forth in appellee's brief in *Sibron* v. *New York*, No. 63, are

sufficient cause for concern, but the President's Commission on Law Enforcement and Administration of Justice has shown that these statistics grossly underrate the actual amount of crime [THE CHALLENGE OF CRIME IN A FREE SOCIETY, p. 21 (1967), hereinafter CHALLENGE OF CRIME]. In addition to the direct harm from robberies, assaults, burglaries, larcenies, homicides and the other offenses which form the bulk of the burden of "street" crime, a serious indirect effect has been documented by the President's Commission: widespread fear in the community. "One-third of Americans feel unsafe about walking alone at night in their own neighborhoods," according to a leading survey [*id.* at 50]. Such fear, the Commission has found, has impoverished the lives of many Americans, especially in high-crime neighborhoods in large cities [*id.* at 52]. For the millions of Americans who are directly and indirectly victimized by crime, "The right of the People to be secure in their persons, houses, papers, and effects" is a broken promise.

Thus, the great public interest in preventing and abating crime cannot be discounted. Stopping and interrogating suspicious persons in public places is essential to these ends, since it is a vital part of the main job of a police force: patrol.

> "The heart of the police effort against crime is patrol—moving on foot or by vehicle around an assigned area, stopping to check buildings, to survey possible incidents, to question suspicious persons, or simply to converse with residents who may provide intelligence as to occurrences in the neighborhood.
>
> "The object of patrol is to disperse policemen in a way that will eliminate or reduce the opportunity for

misconduct and to increase the likelihood that a criminal will be apprehended while he is committing a crime or immediately thereafter. The strong likelihood of apprehension will presumably have a strong deterrent effect on potential criminals. The fact of apprehension can lead to the rehabilitation of a criminal, or at least to his removal for a time from the opportunity to break the law" [PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE, p. 1 (1967); see also *id.* at 58; CHALLENGE OF CRIME, p. 97].

It is clear, moreover, that proper police patrol would be impaired if the officer could not use his official authority to stop persons for brief inquiry as to their identity or purpose, without grounds for taking them into custody. For example, if a person who is reasonably suspected of being the perpetrator of a known crime appears on the patrolman's beat, authority to detain him briefly and question him should not be denied because the officer lacks grounds to remove him to the police station for booking. In a case occurring in New York City, a foot patrolman had been supplied with a photograph of a named robbery suspect, who the police had been informed was expected to appear in his area. The patrolman saw a man there whom he believed he recognized from the picture. Assuming that the information supplied to the patrolman as to the suspect's connection with the crime was insufficient to establish probable cause for belief of his guilt, or that the resemblance of the man in the street to the suspect depicted in the photograph was equivocal, nevertheless, it would have been poor police work and a breach of duty for the patrolman not to have stopped the man, detained him briefly, and asked him to identify himself. "I walked

up to him," the patrolman later reported, "I asked him for his identification. He reached into his pocket, took out a wallet and dropped it. Then he pulled his gun." As the officer struck him with the nightstick, the suspect fired, critically wounding two detectives who had approached from behind the patrolman.*

In a similar incident that took place the same year in another city, a patrolman on radio motor patrol received a broadcast alerting the police to a murder suspect. Shortly thereafter, the patrolman "pulled up alongside a man walking in the same direction. The man met the general description of the suspect wanted in connection with" the killing. Apparently the officer, while lacking grounds for outright arrest, properly used his authority to order the suspect to stop. The man "walked over to [the patrolman's] car, rested his arms on the right hand side of the car, and apparently exchanged words with [the patrolman] through the window. [The patrolman] opened the door of the left side and started to walk around the front of his car. As he reached the front wheel on the driver's side, the man on the sidewalk drew a revolver and fired several shots in rapid succession, hitting [the patrolman] four times and killing him instantly." The patrolman was J. D. Tippit of the Dallas police, the suspect Lee Harvey Oswald.** In another case, detectives at their posts in Brooklyn saw a man enter a parked Cadillac, which was listed as stolen, and sit in the driver's seat. Surely, whether or not

* N. Y. Times, April 25, 1963, p. 1, col. 7; Supervisor's Report of Employee's Injury/Sickness, Form P.A. 9, April 24, 1963, Personnel Safety Unit, Police Academy, N. Y. C. Police Department.

** REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY, pp. 6-7 (1964).

the officers had grounds for taking the man to the station house and charging him with grand larceny of a motor vehicle, it was reasonable for one of them to walk up to inquire about the vehicle, and, in order to preclude possible flight, and reduce the risk that the man would reach for a weapon, to ask the man to get out. In response, the suspect shot the officer in the thigh, then shot the two other detectives and fled.*

Frequently, the facts known to the officer leave him unclear as to whether a crime has occurred, but the situation calls for immediate action to prevent a potential crime or apprehend a possible criminal. In an illustrative case, a patrolman saw a man at 3:00 a.m. in a "crouched position between parked cars with hands placed on door." Frisked and questioned, the suspect said that he was "looking to buy a car."** He was not detained further, but doubtless, if his intentions had been larcenous, they were promptly and effectively changed when the officer intervened and learned his identity. In another example, a New York City officer on motor patrol at night saw a woman running out of a bar, followed by two men. He could reasonably suspect that they had assaulted her, or were about to assault her. Perhaps they were innocent and she the offender, or maybe all three were running to catch a bus. Although the situation was too doubtful for an arrest, unquestionably it demanded that action be taken. The officer stopped the men and questioned them. An altercation ensued and the patrolman was stabbed under

* N. Y. Times, April 1, 1967, p. 1, col. 4.

** Report of Stopping by Force or Stopping Accompanied by Frisk, Form U.F. 250, Serial No. 8, 42nd Precinct, N.Y.C. Police Department.

the heart.* An officer responding at 1:45 a.m. to a radio alarm reporting "shots fired" at a certain address on Morningside Drive in Manhattan, arrived at the premises in time to see a man leaving, his right hand in his coat pocket. The officer would have been negligent, under all of the circumstances, not to detain the man for inquiry, and to examine his clothing externally.** Perhaps the reported noise was not connected with a crime, or the man was not the shooter. But his appearance at the place specified, at this late hour, reasonably aroused the officer's suspicions. To have let him go on his way undisturbed might have been to ignore the only means of apprehending the perpetrator of a serious assault or homicide. To have eschewed the self-protective frisk might have meant serious injury, although to use it meant only minor interference, one readily forgivable by a responsible innocent citizen.

All industries employing persons productively in circumstances of risk or injury are expected to provide safety measures to reduce the prospects of harm. Ultimately, the cost is borne by the employer, or the community. The heart of police work, the President's Commission has said, is patrol, and the frisk is the patrolman's safety belt, its costs to society minimal compared with the dangers it aims to reduce. Underlying the threat to the officer on patrol is the widespread illegal possession and use of dangerous weapons, and the consequent danger that such weapons will

* Supervisor's Report of Employee's Injury/Sickness, Form P.A. 9, April 29, 1963, Personnel Safety Unit, Police Academy, N.Y.C. Police Department.

** Report of Stopping by Force or Stopping Accompanied by Frisk, Form U.F. 250, Serial No. 1, 26th Precinct, N.Y.C. Police Department.

be in the possession of many persons who are reasonably suspected of serious crimes. New York State has done more to control and regulate concealed weapons than any other state, or the federal government. Nevertheless, the problem worsens. For example, the New York City Police Department annually reports the number of dangerous weapons received by the Police Property Clerk; last year, almost 8,000 revolvers and pistols were taken in by the police (A44).* In a recent statement supporting further legislation controlling firearms, to supplement New York's "Sullivan Law" [former N.Y. Penal L. §1897, revised Penal L. §265.05 (1967)], the Commissioner of the New York City Police Department reported:

> "Despite these controls, during the year 1966 in New York City, handguns were involved in approximately 5,500 instances of robbery; 184 cases of murder and non-negligent manslaughter; and approximately 2,340 cases of felonious assault. We feel that the instances of handguns use in these crimes would be far greater without our program of licensing control. It seems clear that the very nature of the weapon in terms of its size and, hence, its easy concealability makes it relatively easy for the criminal element to acquire handguns elsewhere, and bring them here."**

A loaded gun or a dangerous knife is carried for use. From 1960 through 1966, eighteen New York City policemen were killed with weapons while apprehending suspects, sixteen with guns, two with knives (A43). During roughly the

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* References to the Appendix to this brief are preceded by the letter A.

** Howard A. Leary, statement before the Subcommittee on Firearms Control of the N. Y. City Council, and the Joint Legislative Committee of the State Legislature on Firearms Control, August 24, 1967. See also CHALLENGE OF CRIME, p. 4.

same period, 69 New York City officers were wounded by gun shots, 121 by stabbings (A43). The FBI found that of the 335 police officers who were killed in the United States during these years while performing their duty, almost all were killed with handguns [1966 UNIFORM CRIME REPORTS, pp. 46-48].

The risks to investigating patrolmen from these concealed weapons are illustrated by countless such instances of assaults by suspects who are found in incriminating circumstances and facing apprehension. According to one study, for example, 43% of the policemen who are shot while investigating suspects who are in automobiles have already made the initial contact, and are interrogating, issuing a summons, or requesting a check by radio [Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. CRIM. L., C. & P. S. 93 (1963)]. The FBI has concluded that 12% of the police officers who were killed in the United States in the past seven years while performing their duty were slain while "investigating suspicious persons and circumstances" [1966 UNIFORM CRIME REPORTS, pp. 46-48]. Persuaded, in large measure, by recurring evidence of such assaults, the President's Commission and other distinguished students of field interrogation, and numerous state and federal courts, have considered the authority to frisk suspects under certain conditions a necessary adjunct of the imposition upon police of the duty to investigate suspicious circumstances and stop suspicious persons in the field.

Injuries occur even when safety devices are available, because in a given instance they are not used or are ineffective. The assault may precede the opportunity to frisk. Or the utility of the frisk may be vitiated by the interven-

tion of the suspect's accomplices. For example, one police report dryly notes that an officer investigating two youths who were "trying doors" at 11:35 p.m. "was apparently overpowered in the dark, poorly lighted area * * * and received gun shot wound in back."* In other instances, a normal frisk would not reveal the weapon. An officer in one such case saw a man running from the rear of the police station, shouted to him to halt, and was bludgeoned with a nightstick which the man had secreted up his sleeve.** In many other cases, the officer, out of self-restraint, or carelessness, does not use the frisk at a time when it is available to him. In one such instance, on a Saturday night in the summer of 1965, a man appeared in a tavern in New York City, told the barmaid that he was an undercover federal narcotics officer about to make an arrest, and confirmed the story by showing off a revolver. Suspicious, the lady reported the occurrence to an off-duty patrolman who was in the bar. The patrolman waited for another officer to arrive, conferred with him, and agreed to ask the suspect for identification. He asked the suspect to step into an alcove. There, the suspect fatally shot the patrolman, and he was killed running away.† Although the frisk, like the safety

* Supervisor's Report of Employee's Injury/Sickness, Form P.A. 9, January, 1965, Personnel Safety Unit, Police Academy, N.Y.C. Police Department.

** Supervisor's Report of Employer's Injury/Sickness, Form P.A. 9, April 23, 1964, Personnel Safety Unit, Police Academy, N.Y.C. Police Department.

† N. Y. Times, Aug. 1, 1965, p. 62, col. 3; Supervisor's Report of Employee's Injury/Sickness, Form P.A. 9, July 31, 1965, Personnel Safety Unit, Police Academy, N.Y.C. Police Department. In a typical case where no frisk was made, a patrolman was questioning a suspect on a street corner at 1:00 a.m., when the suspect stabbed him in the hand with a paring knife. Supervisor's Report of Employee's Injury/Sickness, Form P.A. 9, February 13, 1966, Personnel Safety Unit, Police Academy, N.Y.C. Police Department.

belt, does not prevent all injuries or deaths, it is reasonable to draw a connection between general violence by suspects who are apprehended or detained, and the utility of the frisk technique. Indeed, it is self-evident that in many of the instances of injuries described herein a reasonable frisk would have saved the officer's life or spared him injury. The suspect, too, would have been spared the consequences of his aggressive outburst.

There is no scale for balancing the life of a policeman against the embarrassment and inconvenience of a frisk to innocent private citizens whose conduct has reasonably aroused suspicion. There is no formula for measuring the physical wounds of policemen doing their duty against the injuries to the personal sensibilities of innocent persons whom officers reasonably suspect of a crime. But in our complex urban society, even more than in Donne's England, no man is an island entire unto himself. Like the innocent bystander to a crime who is called upon to suffer the interferences flowing from becoming a witness, these innocent persons may not be heard to protest that they do not wish to become "involved." And it may be presumed that only a clear showing of inherent widespread abuse would justify barring such a minor intrusion on personal privacy. We turn now to the application of Section 180-a by the police.

**(c) The statute can be applied reasonably, and with restraint.**

The official interpretation of a statute by the agency administering it is evidence of its meaning and impact [*Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294,

315 (1933)]. In *Miranda* v. *Arizona* [384 U. S. 436 (1966)], this Court referred to police manuals describing various aggressive interrogation practices as evidence that station-house interrogation is inherently compulsory. By contrast, the application of the New York stop and frisk statute by the Police Department of New York City demonstrates that the law is not inherently abusive, and can be applied with restraint.

There seems to be agreement among those most familiar with this field that the stop and frisk procedures are capable of regulation and control by proper administrative efforts, and that the combination of statutory and administrative regulation of the type recently adopted in New York State is the best method of control [TASK FORCE REPORT: THE POLICE, pp. 17, 38-41; CHALLENGE OF CRIME, pp. 103-104; see TIFFANY, MCINTYRE AND ROTENBERG, DETECTION OF CRIME, pp. 88, 92-94 (1967)]. The New York City Police Department and the New York County District Attorney's Office joined with other law enforcement agencies all over the state to publish a set of "guidelines" for police officers prior to the date on which the new law became effective. "Five pages of specific requirements, limitations, prohibitions, and examples were used to elaborate upon the legislation which itself is contained in two relatively brief paragraphs. Emphasis was not placed upon defining the law so much as it was upon urging the police to exercise restraint and to act well within the outer limits of their prescribed authority" [TASK FORCE REPORT: THE POLICE, p. 17]. The President's Commission has stated:

> "* * * [D]efining the amount of objectively based suspicion that justifies a 'stop,' in such a way that the

> definition will be of some help to a patrolman on his beat, takes much thought and much expertise. However, it is by no means impossible. The bulletin of the New York State Combined Council of Law Enforcement Officials affords the patrolman practical guidance for his actions, including examples, factual variables, and guiding principles. In effect, this carries the New York 'stop and frisk' statutory provision into the street situations in which it is administered. The administrative guidance supplements the general legislative policy" [CHALLENGE OF CRIME, pp. 103-104].

These guidelines were distributed to all members of the New York City Police Department (A5-A13, A20). The training program in the New York City Police Department in the cautious and proper administration of the stop and frisk statute has also included lectures (A1-A4), instructions on television (A18-A24), and special recruit training (A25-A28).

The recommendation that a written report be prepared if force is used [TASK FORCE REPORT: THE POLICE, p. 183] has been implemented. A form, "U.F. 250," is to be prepared "by a member of the force each time he stops a person under the authority of the law and the stopping is done by the use of force, or the person stopped is either frisked, or frisked and searched" (A14; see also A7, A20, A28). This form, reproduced below (A17), fulfills a valuable educative function. Like the accompanying training materials, it makes plain to any officer that the power to stop, and the authority to frisk for weapons, are to be used with utmost restraint; that the stop or frisk must be justified by a reasonable suspicion—one for which a reason can be given; and that an internal examination of the suspect's

clothing is the exception, not the rule. Indeed, by its detail alone, it reminds the officer that the authority granted by the statute is to be used with care. Such explicit confinement of authority is probably the most effective way to achieve self-regulation of police in the exercise of precautionary procedures which they would undoubtedly use with or without statutory sanction.

The material distributed to the police also points up to the officer the limitations on his powers if the suspect refuses to stop or answer his questions.

> "Should the suspect refuse to answer the officer's questions, the officer cannot compel an answer and should not attempt to do so. The suspect's refusal to answer shall not be considered as an element by the officer in determining whether or not there is a basis for an arrest" (A10; see also A11, A22, A27).*

The instructions properly explain that "false or unsatisfactory" answers "may serve as an element in determining whether a basis for arrest exists" (A11) [*cf. Peters* v. *New*

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* A pamphlet entitled YOUR RIGHTS IF ARRESTED, prepared by the Civil Rights Bureau of the Office of the Attorney General of New York State, and distributed by the New York State Bar Association in cooperation with the Attorney General, includes the following discussion of the stop and frisk law:

> "CAN YOU BE DETAINED WITHOUT BEING ARRESTED?
>
> "A policeman may wish to question you without making an arrest. The law permits a policeman to stop any person in a public place who he reasonably suspects is committing, has committed, or is about to commit a felony or other serious crime. He may demand to know your name, address, and an explanation of your actions.
>
> "You are not required to answer; the right to remain silent is guaranteed to you by the Federal and New York State Constitutions."

The pamphlet is printed in English and Spanish editions.

*York,* No. 74]. However, "if an officer determines that an answer is 'unsatisfactory' and relies upon this in part to sustain his arrest, he should be able to explain with particularity the manner in which it is 'unsatisfactory'" (A11, A27). "If the suspect refuses to stop," the guidelines also provide, "the officer may use reasonable force, but only by use of his body, arms and legs. He may not make use of a weapon or nightstick in any fashion" (A7-A8; see also A11, A17, A26). Appellants urge that *Peters* v. *New York,* No. 74, wherein the New York City police officer used his gun, shows that these guidelines are unworkable. Surely, more evidence than this isolated case is required to support such a judgment. It may also be noted that in *Peters,* the officer, responding spontaneously to the hallway incident, may have felt that there was probable cause to believe that Peters and his confederate had attempted a burglary. Or, not being in New York City, he might have considered the encounter outside the scope of his official capacity; this was a subject of considerable doubt before the Court of Appeals' decision in *Peters* [see Curtis, *Extraterritorial Law Enforcement in New York,* 50 CORNELL L. Q. 34 (1964)].

Erring on the side of caution, the police guidelines restricted the use of the authority to stop generally to incidents occurring on the street, in open public places, such as parks, and in transportation depots. Although the statute permits a stop "abroad in a public place," reflecting the common law concept, the guidelines provided that "this phrase is viewed as not including the public portions of private buildings, such as hotel lobbies, moving picture theaters, licensed premises, *etc.*" (A8; see also A26). This

unnecessarily restrictive view proved unworkable in the day-to-day responses of patrolmen to spontaneous incidents demanding police reaction (A37). The Court of Appeals "countermanded" this guideline in *People* v. *Peters, supra,* properly recognizing the reasonableness of stopping and frisking persons in other public places where crimes frequently occur, such as the common areas of residential buildings. This sound holding was subsequently conveyed to the police (A30-A32). It may be noted, however, that about three-quarters of the incidents reported by the New York City police occurred on the streets, and 80% in open areas (A37).

The Appendix to this brief also includes statistics showing the crimes typically suspected by the police officers when they used the stop and frisk law, *amicus* having listed the crimes suspected by the officer as reported in the U.F. 250 forms (A35). Crimes most frequently suspected are grand larceny, including auto theft, and receiving stolen property; burglary and unlawful entry; robbery; criminal possession of a weapon; sale or possession of narcotics; and felonious assault. These are also the most frequent serious crimes (A46). Moreover, the high rates for such crimes (A45-A46) show clearly the public interest demanding reasonable law enforcement methods to abate them.

As to the touching of the suspect for purposes of safety, the police directives limit the statutory "search" to a patting of the suspect's clothing (A12, A17, A21-A22, A28). And the instructions also establish that the frisk may not be used to look for evidence of crime (A7, A11-A13, A17, A21-A22, A27). It has been alleged that the police will invariably frisk suspects if such authority is granted to

them under any circumstances, but it is clear from the experience in New York City that such is not the case. The fatal and non-fatal assaults upon police officers who did not frisk the suspect, illustrated above (pp. 24-25, 30), are grim refutation of this claim. The New York City U.F. 250 reports which have been filed include over 300 cases of persons who were stopped by reasonable force but who were not frisked (A34). In a typical case, patrolmen received a radio call at 1:00 a.m. about "men tampering with auto" at a parking lot. Upon arrival, the officers saw two men crossing the street from the vicinity of the parking lot carrying an automobile bumper jack. They were stopped, but not frisked, gave an explanation for their possession of the jack, and were not further detained.* Appellants cite the disclosure by the President's Commission on Law Enforcement and Administration of Justice that in New York City, according to the Police Department, statutory "searches" (frisks) "were made in 81.6 percent of stops reported" [TASK FORCE REPORT: THE POLICE, p. 185]. As is noted above, however, this Police Department statistic is based only on the cases *reported*, and the reports are designed only for stops accompanied by frisks or use of force, not for all stops. Information as to the use of the statute in Buffalo, the State's second largest city, verifies that the law is not considered a general invitation to frisk all persons stopped. In 1931 reported stops, with and without force, only .553 persons were frisked (A47).

The occasional discovery of contraband and other incriminating items by officers conducting self-protective

* Report of Stopping by Force or Stopping Accompanied by Frisk, Form U.F. 250, July 20, 1966, Serial Nos. 13, 14, 24th Precinct, N.Y.C. Police Department.

frisks is no proof that the statute is a camouflage for exploratory searches. Just as a search is not justified by what it turns up, a frisk is not voided by what it discloses. If *Sibron* v. *New York* represents an unauthorized search for contraband, as appellee concedes, that case is not typical of the experience with Section 180-a in New York City. It may also be noted, as appellee points out, that the record in the *Sibron* case indicates that the officer apparently did not consider that the statute had any relationship to the case.

**(d) The statute is not discriminatory.**

Despite—or because of—vehement reaction against the New York statute when it was enacted,* there has been no general abuse. It would appear, on the contrary, that the statute and its attendant police regulations have actually reduced abuse of citizens by field interrogation. In New York City, the Police Department has made it crystal clear to its officers that aggressive use of the statute is against official policy, and that caution and restraint are the aim of the superior officers (A3-A4, A5-A8, A11-A12, A16, A19, A23-A24, A32). The policeman "who would engage in the abuse which many citizens fear does not need the 'stop and frisk' authorization to do so * * *. To grant the additional alternative [to taking no action or arresting the suspect], as embraced in the 'stop and frisk' concept, can only help the conscientious officer to protect the community against criminal violence, and at the same time result in benefits to honest, law-abiding citizens who find

* When the law was passed, for example, an "Emergency Committee for Public Safety" was formed to assist persons abused under the law. N. Y. Post, Mar. 4, 1964, p. 3, col. 4.

themselves in circumstances which attract police attention" [Younger (District Attorney, Los Angeles County), *Stop and Frisk: Say It Like It Is,* 58 J. CRIM. L., C. & P.S. 293, 295 (1967)]. If, as appellants here suggest, the statute is to be judged unreasonable because it may be abused, "there is no police procedure which should not be judged unreasonable on the same ground" [*id.* at 299]. It is noteworthy that commentators cited by appellants and *amici* on their behalf to show potential abuse under the New York statute give examples of police misconduct in other states, but have endorsed the New York law, or similar non-statutory police procedures under proper guidelines [REPORT AND RECOMMENDATIONS OF THE COMMISSIONERS' COMMITTEE ON POLICE ARRESTS FOR INVESTIGATION, DISTRICT OF COLUMBIA, p. 64 (1962); Reich, *Police Questioning of Law Abiding Citizens,* 75 YALE L. JOUR. 1161, 1167, 1170 (1966); LAFAVE, ARREST—THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE, *supra;* TIFFANY, MCINTYRE AND ROTENBERG, DETECTION OF CRIME, *supra*].

The principal claim presently before this Court as to potential abuse under the New York statute is discrimination against members of minority groups. In New York City Negroes and Puerto Ricans are stopped in disproportion to their numbers (A39). However, application of a law to persons in certain groups in disproportion to their percentage of the population does not render the statute unconstitutional. Only intentional and systematic discrimination would be sufficient to void the statute [see *Wright* v. *Rockefeller,* 376 U. S. 521 (1964); *Swain* v. *Ala-*

*bama*, 380 U. S. 202, 208-209 (1965); *Hoyt* v. *Florida*, 368 U. S. 57, 59, 69 (1957); *Beck* v. *Washington*, 369 U. S. 541 (1962)]. In the administration of a law, "proportional class representation is not a constitutionally required factor" [*Hoyt* v. *Florida*, *supra*; *Swain* v. *Alabama*, *supra*].

The explanation for the disparity is not systematic discrimination, but the disproportion of such persons, at this stage of our history, whose conduct arouses justifiable police suspicion—whether the policeman be white or black. Indeed, any reasonable police practice in the area of search and seizure—unannounced entry to effect an arrest, obtaining of a search warrant, or arresting a man in the street without a warrant upon probable cause—will affect persons in minority groups out of proportion to their number. It is an unavoidable fact of the development of our country that new groups arriving in the city, be they Irish, Italians, Jews, Negroes or Puerto Ricans, have committed a disproportionate share of street crimes. For example, in 1965 the United States arrest rate for FBI "Index" crimes and larceny under $50 was four times as high for Negroes as for whites [TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT, p. 78 (1967)]. The difference is apparently even higher in metropolitan areas [*id.* at 210]. In the national capital, where Negroes comprise about half the population, 85% of the robberies, assaults, burglaries and similar crimes are committed by Negroes, according to the conviction records of the United States District Court.* "No

* ADMINISTRATIVE OFFICE OF THE U. S. COURTS, 1964 REPORT, Part 2(VI), reproduced in *Hearings Before the Committee on the District of Columbia of the Senate*, 89th Cong., 1st Sess., pt. 1 at 73 (1965).

figures on adult crime are broken down in New York by race; but unofficially the mayor's office makes available the estimate that 80% of all crimes in New York is committed by what are called 'non-whites'—Negroes and Puerto Ricans, generally of the late teens and early twenties" [WHITE, THE MAKING OF THE PRESIDENT 1964, p. 241 (1965)]. Race is not the cause of crime, the crime rates being associated with other factors which are also associated with race. But the figures indicate that these other factors, while producing a racial disproportion in the crime rate, also lead, by the same token, to a disproportion in the rate of persons whom the police reasonably suspect.

Plainly, "normal, completely fair police work" would produce the arrest or stopping of large numbers of persons in these groups [TASK FORCE REPORT: THE POLICE, p. 183]. The President's Commission's studies of police practices in several northern cities "found no discriminatory treatment against Negroes in comparison to whites of the same economic level" [*id.* at 164; see also CHALLENGE OF CRIME, pp. 99-100]. Apparently, in New York City no fewer weapons are recovered from Negroes and Puerto Ricans than from whites, in proportion to the number of frisks of persons in those groups (A39).*

It is claimed, however, that "stop and frisk" is different from all other law enforcement measures which affect members of minority groups disproportionately. Al-

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* See also 2 STUDIES IN CRIME AND LAW ENFORCEMENT IN MAJOR METROPOLITAN AREAS (FIELD SURVEYS III), pp. 85-88 (Report of Research Study Submitted to President's Commission on Law Enforcement and Administration of Justice, 1967), quoted in brief of AELE, *amicus curiae*, pp. 15-16.

legedly, the standard of reasonable suspicion permits the patrolman improperly to consider a citizen's race as a factor in determining whether to invoke official authority. However, the standard is no different in this respect from probable cause, by which standard a patrolman may arrest persons abroad in the street, without a warrant. Application of the standard of reasonable suspicion, it is true, entails police contacts with a greater proportion of innocent persons than are apprehended by the standard of probable cause. Thus, as has been argued, more innocent Negroes will be stopped or frisked under the former test than will be taken into custody under the latter. But the same is true of innocent white persons. And the cases of abuse cited to this Court—such as the repeated stopping of an interracial couple in Los Angeles, or the instances of deliberate rudeness or patronizing by police—are irrelevant to the determination whether the theory of stop and frisk conflicts with the Fourth Amendment. Such harassment is patently wrong, and the officers who resort to it and the citizens victimized by it know that, with or without judicial or legislative approval of the theory of stop and frisk. Since the purpose of such behavior is not to obtain evidence of guilt, the only effective sanction available to the judiciary under the Fourth Amendment, exclusion of evidence obtained by an unreasonable search and seizure, is an ineffective remedy for the misconduct.

Crime is color blind. All groups want protection from crime, and all suffer from it. Members of minority groups are the main victims. For example, in the United States the rate of victimization for aggravated assault for nonwhites is 87% higher than for whites, and it is 60% higher

for burglary, 250% higher for robbery, and 74% higher for theft of motor vehicles [TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT, p. 80]. Although such statistics are not kept by the New York City Police Department, "neighborhood-by-neighborhood statistics indicate that a large majority of violent crimes are committed within ghetto areas such as Harlem, East New York and the precincts surrounding the Grand Concourse in the Bronx" [Zion, *Interracial Assaults,* N. Y. Times, April 18, 1967, p. 29, col. 3]. Understandably, public opinion polls show that for nonwhite Americans crime is considered one of the most important domestic problems [CHALLENGE OF CRIME, pp. 49-51; TASK FORCE REPORT: THE POLICE, p. 148]. While over-enforcement by police aggravates community tensions, so do crime and under-enforcement.* "For example, in Watts, of the 41 percent of Negroes who believed that the police were doing a 'not so good' or 'poor' job (47 percent thought the police were doing an 'excellent or pretty good job'), many cited lack of adequate protection as the basis of their opinion rather than brutality, dis-

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* *Cf.* Barner, *Harlem Angry Over Crime,* Amsterdam News, Oct. 28, 1967, p. 1, col. 8:

> "Unrest over the prevalance of violent crime in Harlem has brought demands for increased police action from several sources over the past weeks. Police have taken quick steps to cope with much of the problem.
>
> "The area's present reputation for high crime and dope addiction, however, has caused some uptown businessmen and civic spokesmen to take a damping attitude toward proposed major government construction * * *
>
> "Over 700 Harlem residents jammed an anti-crime rally last week at the St. Charles R. C. Church, 211 W. 141st St., proclaiming: 'We're afraid to walk the street; we're terrified in our homes.'"

courtesy or discrimination" [TASK FORCE REPORT: THE POLICE, p. 148; see also p. 183].

Even reasonable police conduct—the only kind authorized by the stop and frisk statute—will create tensions in the community. "It is not possible for the police to enforce the law and preserve the peace without incurring some hostility and resentment. This is inherent in the very nature of police work" [TASK FORCE REPORT: THE POLICE, p. 178]. Two cases occurring last year in South Harlem in the same police precinct illustrate this conclusion. On a Saturday evening, a lady resident of 122nd Street told a patrolman *that two young male Negroes had just snatched* her purse and fled north through an alleyway of the building where she lived. The officer stopped a youth of seventeen who was running through a housing development two blocks north, made a frisk, and returned him to the scene. The complainant was unable to make a positive identification, and the suspect was released, having been detained for ten minutes.* Perhaps, as is claimed by a friend of the Court, there is "growing dissatisfaction on the part of many Negroes, especially the young, which focuses on the police as the most visible and provocative members of the white community" (brief of N.A.A.C.P. Legal Defense Fund, *amicus curiae*, p. 67). The youth in this case might have shared the dissatisfaction. But if the officer (who had an Irish name) had not taken the proper action he did, the complainant, whose week's wages might have been in the purse, would have had far better cause to be resentful of

* Report of Stopping Accompanied by Force or Stopping Accompanied by Frisk, Form U.F. 250, April 9, 1966, Serial No. 8, 26th Precinct, N.Y.C. Police Department.

the police. In the second case, at 12:30 at night a patrolman on 133rd Street near Broadway, a street frequently used by residents of a nearby housing project on their way home from a subway station a few blocks away, observed two men for five minutes loitering on the street, and on two occasions following persons who passed by them. Suspecting a possible robbery, the officer stopped and frisked them, and learned their identities. The men, both Negroes, protested that the officer had no right to stop them.* But surely the residents of that neighborhood returning to their homes were entitled to security from a mugging or other interference.

Thus, as the District Attorney of Los Angeles County cogently suggests, blanket disapproval of the theory of stop and frisk on Fourth Amendment grounds, because of incidents of police harassment or misconduct because of race, would needlessly penalize civilians and policemen of all races for whose benefit the proper procedures are employed. The bigoted, unprofessional or unthinking policeman would not significantly alter his conduct. The upright police officer, who uses the stop and frisk procedures properly, would adhere to the Court's commandment. Since his right of self-defense by a frisk would be removed, most likely he would refrain from interfering with the suspected "enforcer" reportedly armed and abroad in a block inhabited mainly by Negroes (see p. 15, *supra*) [*cf. People* v. *Teams*, 18 N.Y.2d 835 (1966), *affirming* 20 A.D.2d 803, 25 A.D.2d 496 (2d Dept. 1964)], or the apparent night prowler

* Report of Stopping by Force or Stopping Accompanied by Frisk, Form U.F. 250, October 5, 1966, Serial Nos. 21, 22, 26th Precinct, N.Y.C. Police Department.

on the tenement roof (see p. 3, *supra*). (In a similar incident the year before, a patrolman was shot and killed on the roof of an East Harlem tenement while investigating a report of a prowler).* Since his authority of temporary detention would be stripped, he would not detain the men on the Harlem street who might be waiting to ambush passers-by returning home late at night, or the men apparently "casing" the tavern in the Puerto Rican neighborhood (see p. 14, *supra*) [*cf. People* v. *Rivera*, 14 N.Y.2d 441 (1964), *cert. denied* 379 U. S. 978 (1965)]. For it is in the Lower East Side, not the East 60's, in Harlem, not Sutton Place, that "stop and frisk" is and should be most often used by good police officers.

In sum, there being no demonstration that the stop and frisk statute is intrinsically unworkable or abusive, and overwhelming support for its reasonableness, voiding the statute outright on the meager hearing records presently before the Court, or upon the instances of bad conduct by policemen cited by appellants, would be unwarranted. Far from an encouragement of restraint in state law enforcement, that would be a needless rebuff of a conscientious effort by the legislature and law enforcement agencies to conform the right of every person "to be let alone" by the police with the right of all persons in the community to be let alone by robbers, burglars and other intruders upon the privacy of citizens.

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* N. Y. Times, May 30, 1963, p. 41, col. 1.

## Conclusion

***Section 180-a of the New York Code of Criminal Procedure should be upheld.***

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